1	IN THE SUPREME COURT OF THE UNITED STATES	
2	x	
3	FLORIDA, :	
4	Petitioner :	
5	v. : No. 08-1175	
6	KEVIN DEWAYNE POWELL. :	
7	x	
8	Washington, D.C.	
9	Monday, December 7, 2009	
10		
11	The above-entitled matter came on for or	ral
12	argument before the Supreme Court of the United States	S
13	at 11:15 a.m.	
14	APPEARANCES:	
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16	General, Tallahassee, Fla.; on behalf of the	
L7	Petitioner.	
18	DAVID O'NEIL, ESQ., Assistant to the Solicitor General	1,
19	Department of Justice, Washington, D.C.; on behalf	of
20	the United States, as amicus curiae, supporting the	9
21	Petitioner.	
22	DEBORAH K. BRUECKHEIMER, ESQ., Assistant Public	
23	Defender, Bartow, Fla.; on behalf of the Respondent	t
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1	PROCEEDINGS
2	(11:15 a.m.)
3	CHIEF JUSTICE ROBERTS: We will hear
4	argument next today in Case 08-1175, Florida v. Powell.
5	Mr. Jacquot.
6	ORAL ARGUMENT OF JOSEPH W. JACQUOT
7	ON BEHALF OF THE PETITIONER
8	MR. JACQUOT: Mr. Chief Justice, and may it
9	please the Court:
10	As Courts have recognized, Miranda warnings
11	protect Fifth Amendment rights and promote voluntary
12	confessions, confessions important to seeking truth,
13	solving crimes, and securing justice. Yet the Florida
14	Supreme Court erred in two ways to suppress a voluntary
15	confession relied upon for Kevin Powell's conviction.
16	First, the Florida court misapplied the
17	analysis. Rather than evaluating the warning under a
18	reasonably conveyed standard for the right to an
19	attorney, the court strictly parsed the warning, seeking
20	certain words in a certain order.
21	Second, the court incorrectly found the
22	warning to be misleading. The court ignored the
23	totality of the warning. The court overemphasized the
24	order in which the rights were given, and furthermore,
25	the court applied a hypertechnical analysis of the

- 1 warning's language.
- JUSTICE GINSBURG: But you agree that --
- 3 suppose we accept your position and the case is
- 4 remanded. The Florida Supreme Court could say: Well,
- 5 that's very nice, but we have a Florida Constitution
- 6 with a counterpart to the Fifth Amendment, so we're just
- 7 going to have the same opinion, but we are putting it
- 8 under -- squarely under the Florida Constitution.
- 9 They could do that?
- 10 MR. JACQUOT: Your Honor, the Florida court
- 11 theoretically could, but the Florida court would have to
- 12 do that on State grounds, and in this case, they relied
- on Federal grounds to --
- JUSTICE GINSBURG: Yes, that's what I meant.
- 15 They could do it on State grounds.
- 16 MR. JACOUOT: Theoretically. But this Court
- 17 found in Evans v. Arizona that just because of the
- 18 theoretical possibility that a court could write its
- 19 opinion differently on State grounds, this Court still
- 20 had jurisdiction because the original opinion rested on
- 21 Federal grounds.
- JUSTICE SCALIA: Are the Florida Supreme
- 23 Court elected? Are they elected judges?
- MR. JACQUOT: Your Honor --
- 25 JUSTICE SCALIA: Are they elected judges,

- 1 the Florida Supreme Court?
- 2 MR. JACQUOT: Your Honor, the Florida
- 3 Supreme Court members are first appointed, and then they
- 4 are subsequently elected.
- 5 JUSTICE SCALIA: How -- how long is their
- 6 term? There is a retention election when?
- 7 MR. JACQUOT: Correct. There is a retention
- 8 election every 4 years.
- 9 JUSTICE SCALIA: Every 4 years. And they'd
- 10 have to run for their retention election on the ticket
- 11 that "We've expanded Miranda for Florida purposes,"
- 12 right?
- MR. JACQUOT: Well, Your Honor, they are
- 14 elected.
- JUSTICE KENNEDY: Has the -- has the Florida
- 16 Supreme Court ever explicitly interpreted -- what is it?
- 17 Article I, Section 8, of the Florida Constitution more
- 18 expansively than, and explicitly so, and explicitly so,
- 19 than Miranda?
- 20 MR. JACQUOT: No, Your Honor. The Florida
- 21 Supreme Court has said that the possibility is there,
- 22 but in its decisions it has found it, particularly in
- 23 the case before you --
- JUSTICE STEVENS: Well, they did it in this
- 25 case, didn't they? Under your view, they -- their

- 1 ruling goes beyond Miranda, and they said that the
- 2 Florida Constitution requires this result.
- MR. JACQUOT: No, Justice Stevens.
- 4 JUSTICE STEVENS: So they did do it in this
- 5 very case.
- 6 MR. JACQUOT: No, Justice Stevens. The
- 7 court relied on Federal law. It just got it wrong.
- 8 JUSTICE STEVENS: But it also cited the --
- 9 the Florida Constitution, did it not?
- 10 MR. JACQUOT: It cited the Florida
- 11 Constitution --
- 12 JUSTICE STEVENS: And did it not also say
- 13 that this was a violation of the Federal -- I mean, of
- 14 the Florida Constitution?
- MR. JACQUOT: Yes, Your Honor, it mentioned
- 16 the Florida Constitution. However, in those same
- 17 sentences, it interwove Federal law. It would say:
- 18 Under the Florida Constitution and according to Miranda.
- 19 And this Court in Michigan v. Long has found that
- 20 opinions that interweave State and Federal law are
- 21 appropriate for this Court's jurisdiction.
- 22 JUSTICE SOTOMAYOR: One of your amici -- one
- 23 of the amici suggested that the Florida courts cannot
- 24 read the Florida Constitution more expansively than the
- 25 Federal requirements. Are you rejecting that

- 1 proposition?
- 2 MR. JACQUOT: We do indeed, Your Honor. The
- 3 Florida court in Powell read the warning to -- in line
- 4 with Miranda.
- 5 JUSTICE SOTOMAYOR: And it's a different
- 6 question. One of the amici suggest that the Florida
- 7 Constitution and Florida case law says that they can't
- 8 read the Florida Constitution more broadly than it is
- 9 read under Federal law.
- 10 MR. JACQUOT: Well, Your Honor, the past
- 11 cases have said that the Florida court could, but they
- 12 haven't. And in this case they particularly did not.
- 13 JUSTICE SOTOMAYOR: So this could be a
- 14 first, if we were to start from the proposition that
- 15 Justice Ginsburg did?
- 16 MR. JACOUOT: Well, Your Honor, under
- 17 Michigan v. Long the test is to look at the clear face
- 18 of the opinion, to look for a plain statement that this
- 19 case relied on adequate -- adequate and independent
- 20 State grounds, and that is not there.
- 21 JUSTICE SOTOMAYOR: Do -- do you see a
- 22 conflict between the language of our decisions where we
- 23 often say that Miranda rights have to be clear and those
- 24 decisions that say that whatever is said has to
- 25 reasonably convey the essence of the Miranda warnings?

1	Is there a difference between those two
2	statements, and which of our cases or statements would
3	control?
4	MR. JACQUOT: Your Honor, in Miranda the
5	Court did use the terms "clearly inform." However, this
6	Court has gone on in Prysock to use the term "adequately
7	inform" and Duckworth uses the word "reasonably convey."
8	So yes, although the rights are consistent from Miranda
9	on
10	JUSTICE SOTOMAYOR: So you would suggest
11	that if something is not clear and it's ambiguous, that
12	that's enough? Or or is there a difference between
13	reasonable and clarity? That has to be read in a
14	certain way; otherwise an ambiguous warning
15	MR. JACQUOT: No, Your Honor, I would say
16	that this Court has said that clarity is judged by
17	whether the warnings reasonably convey the rights under
18	Miranda; that's the standard.
19	JUSTICE GINSBURG: Did Miranda itself I
20	mean, it set out the four requirements, but there was a
21	charge I mean there was a warning involved, am I not
22	right? Didn't they cite the then-FBI warning? It has
23	been improved considerably, but there was an FBI warning
24	cited in Miranda itself, was there not?

25

MR. JACQUOT: Yes, Justice Ginsburg, and

- 1 that warning conveyed only the right to attorney. It
- 2 did not have the specific --
- JUSTICE GINSBURG: It also said you have a
- 4 right to keep silent.
- 5 MR. JACQUOT: Correct. But on the right to
- 6 attorney warning at issue here, it said only that the
- 7 suspect has the ability to consult counsel. It did not
- 8 go into the specific, detail the explicit nature of
- 9 spelling out the terms "present" and the terms "during"
- 10 that the Florida Supreme Court required. And that's the
- 11 real issue here before the Court, is whether the Florida
- 12 Supreme Court applied a standard that is significantly
- 13 different than the standard that this Court is
- 14 requiring.
- 15 JUSTICE SCALIA: It told them: You are
- 16 entitled to confer with counsel before answering
- 17 questions, right?
- 18 MR. JACQUOT: What warning, Justice Scalia?
- 19 JUSTICE SCALIA: Wasn't that -- wasn't that
- 20 the warning given -- given in this case? You are
- 21 entitled to consult counsel before answering questions?
- 22 MR. JACQUOT: Yes, the warning in this case
- 23 said you have the right to talk to a lawyer before
- 24 answering any of our questions. And furthermore --
- 25 CHIEF JUSTICE ROBERTS: Now, "any" -- just

- 1 to make sure; you've said two different things. It says
- 2 "any of our questions," right?
- 3 MR. JACQUOT: Well, Mr. Chief Justice, the
- 4 warning said "You have the right to talk to a lawyer
- 5 before answering any of our questions, " and then the
- 6 warning went on to say "You have the right to use this
- 7 right at any time during this interview."
- 8 We would argue that this expresses all the
- 9 rights required under Miranda.
- 10 JUSTICE BREYER: What about the right in
- 11 Miranda that says, in Miranda: "We hold an individual
- 12 held for interrogation must be clearly informed that he
- 13 has the right to consult with the lawyer and to have the
- 14 lawyer with him during interrogation, "okay?
- 15 Where does it say that? Interpret it any
- 16 way you want. We are used to grand juries. In a grand
- jury, he can go consult with the lawyer, but he doesn't
- 18 have the lawyer with him. So, where does it tell him
- 19 that?
- MR. JACQUOT: Well, Your Honor, the standard
- 21 being reasonably convey --
- JUSTICE BREYER: Yes.
- MR. JACQUOT: -- the warning lays out that
- 24 you have the right --
- JUSTICE BREYER: I'm just asking you to

- 1 point to the words that tell him that.
- 2 MR. JACQUOT: The right to talk to a lawyer.
- JUSTICE BREYER: Don't have you a right to
- 4 talk to a lawyer at a grand jury?
- 5 MR. JACQUOT: But a -- Your Honor, a grand
- 6 jury operates very differently than a criminal
- 7 interrogation.
- 8 JUSTICE BREYER: Yes, correct. And so
- 9 aren't you supposed to tell this person, that unlike a
- 10 grand jury, you have a right to have the lawyer with you
- 11 during interrogation? I mean, it isn't as if that was
- 12 said in passing in Miranda. They wrote eight paragraphs
- 13 about it. And I just wonder, where does it say in this
- 14 warning, you have the right to have the lawyer with you
- 15 during the interrogation?
- 16 MR. JACQUOT: Justice Breyer, we have three
- 17 responses to that. First, under Miranda the FBI warning
- 18 did not use the terms "present," did not use the terms
- 19 "with you," and --
- JUSTICE BREYER: It doesn't use the word
- 21 "present," Miranda? It says right here: "We hold" --
- 22 it says -- "not just prior to questioning, but also to
- 23 have counsel present during any questioning." That's
- 24 what Miranda says. And then Miranda, after discussing
- 25 it for five pages, goes on to use the words I just said:

- 1 You have to tell him he has the right to have counsel
- 2 with him. So it does use the word "present."
- JUSTICE GINSBURG: It -- it used it in
- 4 determining -- in -- in stating the obligation of the
- 5 State, but it didn't use those words in setting out the
- 6 warning that the FBI then gave.
- 7 MR. JACQUOT: Correct.
- 8 JUSTICE GINSBURG: It said, this is what --
- 9 States, this is what your obligation is; what you must
- 10 say to the defendant is. And I think the Florida court
- in the same way said: You are entitled to the help of a
- 12 lawyer. Then it spells it out in that opinion, but --
- 13 but what it said had to be communicated was not the --
- 14 the full range. Just you're entitled, I think it was,
- 15 to the help of a lawyer.
- 16 So there -- so there is a confusion, I
- 17 think, between what Miranda spells out and many other
- 18 cases spell out as States' obligation, what the State
- 19 must do, and the statement that must be made to the
- 20 defendant to communicate that.
- 21 MR. JACQUOT: Justice Ginsburg, let me be
- 22 very clear and answer Justice Breyer with the three
- 23 points I began. Miranda requires that law enforcement
- 24 effectively communicate the fact that you can access
- 25 your right to an attorney present and during an

- 1 interrogation. However, in the Miranda opinion they
- 2 approvingly cited the FBI warning that only had the
- 3 terms, the generalized warning: Consult with counsel.
- 4 Furthermore, the ability to talk to your
- 5 lawyer, which is at issue in this warning, is the first
- 6 natural step to getting your attorney.
- 7 And third, as this Court has held in
- 8 Minnick, that it is the representation that matters in
- 9 custodial interrogations.
- 10 JUSTICE BREYER: Well, what FBI are we
- 11 talking about? Because the FBI advice of rights says
- 12 "You have the right to have a lawyer with you during
- 13 questioning." Were they -- and -- and I was taken by
- 14 the fact, "we hold that an individual must be clearly
- 15 informed."
- 16 And so, is there some other case that
- 17 says -- or some other FBI statement that they give
- 18 people that doesn't use the words "with you," that says
- 19 you don't have to say "with you during," or doesn't have
- 20 to say "present during"? Was there some other case that
- 21 said that?
- MR. JACQUOT: Your Honor, the current FBI
- 23 warning does have that. However, there have been
- 24 several cases in the circuits that have held generalized
- 25 warnings to be sufficient, warnings that say only the

- 1 right to an attorney. And one of the issues --
- 2 JUSTICE GINSBURG: The -- the warning that
- 3 Justice Breyer's just referred to, that is long after
- 4 Miranda itself and it was not the warning that the FBI
- 5 gave at the time of Miranda.
- 6 MR. JACQUOT: Correct, Your Honor. And --
- 7 and that is the issue, is what is, first, the standard
- 8 that courts must currently apply in terms of whether a
- 9 warning reasonably conveys. That is not the standard of
- 10 analysis that the Florida court applied.
- 11 And secondly, when evaluating that warning,
- 12 the -- the Florida court incorrectly finds that this
- 13 warning was misleading. And --
- JUSTICE SOTOMAYOR: I have a difficulty in
- 15 terms of this argument about burdening law enforcement.
- 16 This is a preprinted form that the police made up,
- 17 correct?
- 18 MR. JACQUOT: Correct.
- 19 JUSTICE SOTOMAYOR: So what's the added
- 20 burden by making the form absolutely and abundantly
- 21 clear or conforming the form to the statements in
- 22 Miranda? What's the cost to the State? They are going
- 23 to print the form anyway, they are telling their
- 24 officers to read from the form anyway. What's the added
- 25 cost?

1 MR. JACQUOT: Your Honor, there are three 2 reasons why the Florida Supreme Court's standard is 3 problematic. First, the same standard applies to 4 written warnings as to verbal warnings. So you have 5 situations where you have a law enforcement officer who doesn't have his card in his field; there is a verbal 6 7 error; there is an inconsistency in translations. If a 8 suspect is asking questions trying to get clarity, the law enforcement officer is going outside of the card to 9 10 provide that clarity. Those are situations that may not 11 meet the explicit express advice standard of the court. JUSTICE SOTOMAYOR: Well, there is a 12 13 question about how much the subjective intent of the 14 questioner should be involved in this process or not. 15 There are cases where it appears that the plurality of 16 our Court has said it should always be an objective 17 standard, and others where certain members have 18 expressed a question about subjective. 19 But we are dealing with a printed form. wouldn't the intent of the entity at issue be placed in 20 21 question? Meaning, you could have -- the police here 22 could have chosen to be explicit, but instead they chose 23 be -- to obfuscate a little bit and be less explicit. Shouldn't we assume that that is an intent to deceive or 24 25 perhaps to confuse?

- 1 MR. JACQUOT: Absolutely not, Your Honor.
- 2 The Tampa Police in having this warning drafted is
- 3 attempting to reasonably convey the warning, and there
- 4 is good public policy reasons why.
- 5 JUSTICE SOTOMAYOR: But why? The -- the
- 6 easy solution is to do what 90 of the jurisdictions are
- 7 doing: Copy Miranda.
- 8 MR. JACQUOT: Well, Your Honor, we would
- 9 claim that this warning falls within the 97 percent
- 10 cited by amici because it has the word "during" in the
- 11 warning. The Florida court ignored the totality of the
- 12 warning. It chose to place the order of the warning's
- 13 rights in a way that this Court in Prysock and Duckworth
- 14 has found is not the proper analysis.
- 15 Furthermore, this court used a
- 16 hypertechnical approach. It took the words "before
- 17 answering any of our questions," turned that into an
- 18 exclusive statement to say, "only before questioning,"
- 19 and then as a result of that attempted to discount the
- 20 last sentence of the warning. That's the kind of
- 21 parsing, that's the kind of precise formulation, that's
- 22 the kind of construing warnings like a will or defining
- 23 terms like an easement that this Court has rejected.
- 24 JUSTICE GINSBURG: What about the danger
- 25 that Tampa, if you should prevail, will go back to the

- 1 old way? Now, it has a clearer form -- whether this
- 2 form was adequate is one thing. But now, it has the
- 3 form that the -- like the one the FBI currently uses.
- 4 If you prevail, then Tampa can go back to what it had
- 5 before?
- 6 MR. JACQUOT: Your Honor, you are correct,
- 7 in that Tampa has a new form now that does have the
- 8 words "present" and "during" in a different formulation.
- 9 However, there is no indication that they
- 10 would go back to the other form, for several reasons.
- 11 One, law enforcement has an incentive to have Miranda
- 12 rights properly given because they desire there to be
- 13 confessions and for those confessions to be admissible.
- JUSTICE SCALIA: Well, once we say this is
- 15 properly given, my goodness, here's -- here's an
- 16 instruction approved specifically by this Court. I
- mean, I think they should use that, don't you?
- 18 I mean, the other one they are going to have
- 19 to quess about, but this one is approved in a case
- 20 involving Florida by this Court. So you -- it's pretty
- 21 attractive to use that one.
- 22 MR. JACQUOT: Well, Your Honor, law
- 23 enforcement agencies will look to courts for approval of
- 24 this -- of their warnings. The warning at issue in --
- JUSTICE SCALIA: Well, you have to say it's

- 1 okay. You are arguing that it's perfectly okay, so why
- 2 do you hesitate when you are asked, you know, could the
- 3 state go back to doing it? You should say, yes, of
- 4 course, they -- they might; we don't think it's likely,
- 5 but they might, and if they did it's perfectly okay.
- 6 Isn't that your position?
- 7 MR. JACQUOT: Well, Justice Scalia --
- 8 JUSTICE SCALIA: It's not your position?
- 9 MR. JACQUOT: Justice Scalia, they
- 10 theoretically could because the warning was reasonably
- 11 conveyed, it was sufficient. However, it is unlikely
- 12 they would. Law enforcement agencies modify their
- warnings when they become an issue, so when a litigation
- 14 begins on a warning they often modify it at that point.
- 15 JUSTICE STEVENS: Let me -- let me ask you a
- 16 question. Isn't it the case that this particular
- 17 warning is used in one judicial district and the warning
- 18 that was approved in Traylor was used in the rest of the
- 19 State? And so there is an interest -- the Florida
- 20 Supreme Court has, in effect, required the same warning
- 21 throughout the State, and if you prevail, there may be
- 22 one standard warning in one judicial district, and the
- 23 other districts may continue to use the one they have
- 24 used in the past, isn't that right?
- 25 MR. JACQUOT: Well, Justice Stevens, it is

- 1 not true that every jurisdiction in Florida uses this
- 2 same warning. There are varieties of warnings.
- JUSTICE STEVENS: That's true, but if you --
- 4 if they all followed the Florida Supreme Court in this
- 5 case, then they all would use the same warning?
- 6 MR. JACQUOT: Well, Justice Stevens, if they
- 7 were all following the Florida Supreme Court here, they
- 8 would have to explicitly state certain terms in their
- 9 warning.
- 10 JUSTICE STEVENS: Which most of them do
- 11 already.
- MR. JACQUOT: Well, not necessarily. In --
- JUSTICE STEVENS: Not all, but some.
- MR. JACQUOT: Some -- some do, some do not,
- and one of the fears in having an express advice
- 16 standard is that you have continuing terms that are
- 17 required. For instance, the term "before" is lacking in
- 18 30 of 90 jurisdictions in Florida.
- 19 There is nothing to stop the Florida Supreme
- 20 Court, if this Court was to allow an express advice
- 21 standard from then requiring the term "before
- 22 questioning" in addition. That's the kind of danger in
- 23 having an analysis that is much stricter, that
- 24 essentially looks at words that should be in a warning,
- 25 rather than looking at whether the right to attorney is

1	reasonably conveyed to the suspect.
2	Mr. Chief Justice, if there are no more
3	questions, I would like to save the balance of my time.
4	CHIEF JUSTICE ROBERTS: Thank you, counsel.
5	Mr. O'Neil.
6	ORAL ARGUMENT OF DAVID O'NEIL
7	ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
8	SUPPORTING THE PETITIONER
9	MR. O'NEIL: Thank you, Mr. Chief Justice,
10	and may it please the Court:
11	I would like to go directly to Justice
12	Ginsburg's question about what would happen if this
13	Court affirmed the warnings in this case, and I think
14	Respondent's amici make the argument that it will
15	somehow promote a race to the bottom.
16	And I think that history and experience are
17	the best answer to that question. Respondent's amici,

the best answer to that question. Respondent's amici,
who have carefully studied this issue, have found that
some police officers have attempted to evade Miranda by
interrogation techniques, but there is no indication
that police have tried to accomplish that purpose by
changing the language of the warnings, and that is not
because they couldn't do so. For the last 20 years,
Duckworth and Prysock has been on the books, and have

25

made clear that no standard formulation of the warnings

- 1 is necessary and that variant warnings will be upheld.
- 2 And if it were true --
- JUSTICE SOTOMAYOR: Except that Justice
- 4 Scalia just pointed out, if we approve the language of
- 5 this, then -- of this particular warning, it becomes the
- 6 new sort of floor.
- 7 And if we make it the new floor, it --
- 8 doesn't it provide an incentive for police departments
- 9 to move away from the explicit warnings that say during
- 10 and -- before and during interrogations; now we're
- 11 saying -- you know, generalize them more.
- MR. O'NEIL: Well, Justice --
- JUSTICE SOTOMAYOR: Aren't we encouraging
- 14 that?
- 15 MR. O'NEIL: Justice Sotomayor, I have two
- 16 responses to that: The first is that this Court upheld
- 17 the warning in Duckworth, which said, we have no way of
- 18 providing you an attorney, but one will be provided if
- 19 and when you go to court.
- Now, if you -- if it were true that police
- 21 were looking for every way to get around the warnings
- 22 and if changing the warnings were an effective way to do
- 23 that, we should have seen every jurisdiction adopt those
- 24 warnings.
- In fact, of the 900 warnings that are

- 1 included in the survey that Respondent relies heavily
- 2 on, only five have that formulation. Second, four
- 3 circuit courts have held --
- 4 JUSTICE SOTOMAYOR: How many after
- 5 Duckworth? Do you know?
- 6 MR. O'NEIL: I don't -- it doesn't indicate
- 7 when they were adopted, but I think it's fair to say
- 8 that, if police did have that incentive, that we would
- 9 have seen at least some jurisdictions adopt that
- 10 warning.
- 11 JUSTICE SOTOMAYOR: So we don't know how
- 12 many --
- JUSTICE KENNEDY: But your case has to be
- 14 that, if we adopt the Petitioner's petition it's
- 15 perfectly fine for every jurisdiction in the country to
- 16 use this warning, right?
- MR. O'NEIL: We agree that this warning is
- 18 adequate, and our position is --
- 19 JUSTICE KENNEDY: And every jurisdiction in
- 20 the country can use it, so we can -- we can talk about
- 21 whether or not its adequate.
- MR. O'NEIL: They can, and we think that is
- 23 unlikely, and if the concern here is that it will
- 24 destroy the uniformity that the Federal government
- 25 thinks is a good thing as a matter of policy, we think

- 1 that that concern is simply not warranted. But, yes, we
- 2 do agree that these warnings adequately convey a --
- 3 JUSTICE KENNEDY: Excuse me. You think lack
- 4 of uniformity is a good idea?
- 5 MR. O'NEIL: No, we think that affirming
- 6 these warnings will not disrupt the uniformity that
- 7 seems to be in place around the country, and -- for
- 8 exactly the reason that I said, Justice Kennedy, because
- 9 Justice Sotomayor mentioned general right to counsel
- 10 warnings, that if we upheld a general right to counsel
- 11 warning, that jurisdictions would begin to drop the more
- 12 specific language that is contained, for example, in the
- 13 FBI forms.
- 14 CHIEF JUSTICE ROBERTS: Where -- where is
- 15 that? Is that set forth in the -- in the briefs? The
- 16 FBI form? Where is -- where is that set forth?
- 17 MR. O'NEIL: I don't believe the FBI form is
- 18 set out in full. It's on pages 383 and 384 of Miranda,
- 19 and the description of the court's discussion is on page
- 20 29 of our brief.
- 21 And I think, Justice Sotomayor, it is
- 22 significant that four circuit courts have upheld general
- 23 right to counsel warnings of the kind that were in the
- 24 FBI warnings in 1966. But the police departments in
- 25 those jurisdictions have not abandoned the more specific

- 1 language that is contained in the FBI formulation. In
- 2 New York City, the Second Circuit has held in Lamia --
- JUSTICE SOTOMAYOR: What -- how do we deal
- 4 with the fact that, if the purpose of Miranda is to give
- 5 clear warnings, and your adversary says -- not your
- 6 adversary -- your co-counsel -- Petitioner's counsel
- 7 says that means, "clear" means does it reasonably
- 8 convey?
- 9 We've got a split of circuit courts and
- 10 State courts on whether this reasonably conveys or not.
- 11 Shouldn't that be enough of an ambiguity for us to
- 12 conclude it can't reasonably convey, if there's this
- many courts holding that it doesn't?
- MR. O'NEIL: No, Justice Sotomayor. This is
- 15 not like a qualified immunity inquiry, where grounds for
- 16 debate among reasonable jurists would invalidate the
- warning.
- 18 JUSTICE SOTOMAYOR: Are you calling the
- 19 Florida State Supreme Court majority unreasonable
- 20 jurists?
- 21 MR. O'NEIL: No, I think -- I think the
- 22 problem with a standard that permits of no ambiguity is
- 23 that, as Florida just said, this standard will apply,
- 24 not just to printed forms, and it is easy enough to
- 25 create a printed form in advance that includes more

- 1 specific language, but it will also apply to inadvertent
- 2 departures from the standard forms as a result of
- 3 mistake.
- 4 JUSTICE SOTOMAYOR: What happens now is that
- 5 we are dealing with the exception rather than the rule.
- 6 But this was the rule, meaning this was the form that
- 7 they were reading. And if it has some significant
- 8 ambiguity in it, sufficient for at least one court to
- 9 say it wasn't sufficiently clear, it wasn't explicit
- 10 enough, should we worry about the exception as an
- 11 exception?
- MR. O'NEIL: Well, I think -- I think the
- 13 exception is -- needs to be captured within the rule
- 14 that this Court adopts as -- as the standard.
- 15 I -- I also think that it -- it is -- it's
- 16 simply not the case that if this Court, as I said,
- 17 adopts a standard that permits a less explicit, less
- 18 precise warning than the FBI wants --
- 19 JUSTICE STEVENS: Mr. O'Neil, isn't one of
- 20 the problems here that Florida had two different printed
- 21 forms before this case arose, and the Florida Supreme
- 22 Court has said they will all have the same one
- 23 hereafter?
- MR. O'NEIL: Justice Stevens, I'm not aware
- 25 that Florida had two printed forms. I mean, each

- 1 jurisdiction used its own form, and this was the form
- 2 that was in place --
- JUSTICE STEVENS: So at least two of them?
- 4 MR. O'NEIL: Well, every jurisdiction
- 5 adopts --
- 6 JUSTICE STEVENS: Isn't it -- isn't it wiser
- 7 generally to have the same form used throughout the
- 8 State?
- 9 MR. O'NEIL: It is. The government believes
- 10 it is wiser to do that, and the Federal law enforcement
- 11 agencies do that because it avoids --
- 12 JUSTICE SCALIA: And the Constitution
- 13 requires it, right?
- MR. O'NEIL: Well, no, the Constitution does
- 15 not require the precise words of Miranda.
- JUSTICE SCALIA: Well, Miranda supposedly
- 17 says the Constitution requires this warning, and if the
- 18 warning must be in a standard form that everybody uses,
- 19 the Constitution must require a standard form that
- 20 everybody uses.
- 21 MR. O'NEIL: Nowhere in Miranda does it say
- 22 that a -- a standard form is necessary and this Court
- 23 summarily rejected exactly that argument.
- JUSTICE BREYER: Excuse me. Can you just
- 25 devote one minute before you finish --

- 1 MR. O'NEIL: Yes.
- 2 JUSTICE BREYER: -- to the question of why
- 3 these are adequate? If you remember my question, I
- 4 tried to explain why I thought they might not be
- 5 adequate.
- 6 MR. O'NEIL: Justice Breyer, these warnings
- 7 state three rights: The right --
- 8 JUSTICE BREYER: I thought there were four.
- 9 One is to have during, in the presence of, the right to
- 10 have a lawyer during the interrogation, in the presence
- 11 of, with him at the time.
- MR. O'NEIL: Absolutely.
- 13 JUSTICE BREYER: Now, that's one of
- 14 the four. That's one of the things. They devote two
- 15 pages to Miranda and they repeat it when they summarize
- 16 what you have to say. I just want to know where in this
- 17 statement does it say that?
- 18 MR. O'NEIL: Justice Breyer, there is no
- 19 reason to think that a suspect who hears that he can
- 20 talk to an attorney before answering any questions and
- 21 during this interview would infer the unstated
- 22 restriction that he can talk to an attorney but only by
- 23 phone or remotely --
- JUSTICE BREYER: Really? I guess anybody
- 25 who has had prior experience with the law, as this man

- 1 might have done, might be familiar with a grand jury
- 2 proceeding.
- 3 MR. O'NEIL: But for the same reason we
- 4 don't ask whether the suspect has sufficient knowledge
- 5 to supplement the information he needs.
- JUSTICE BREYER: No, no, no. But I tell
- 7 you: Here's your right to talk to a lawyer before
- 8 questioning.
- 9 MR. O'NEIL: Well, it --
- 10 JUSTICE BREYER: Now, you then repeat, you
- 11 can assert that right whenever you want, to talk to him
- 12 before questioning.
- MR. O'NEIL: Well --
- 14 JUSTICE BREYER: And my question is, how
- 15 does that tell him he has a right to have a lawyer with
- 16 him during questioning, that the questioning he has a
- 17 right to have take place from beginning to end in the
- 18 presence of a lawyer, a matter that the Miranda court
- 19 repeated three times in the summary and wrote a eight
- 20 full paragraphs about why that was important?
- 21 MR. O'NEIL: Well, first, as Justice
- 22 Ginsburg noted, Miranda went out of its way to -- to
- 23 specifically approve an FBI warning that said, quote --
- JUSTICE BREYER: Where does it say it
- approves that?

- 1 MR. O'NEIL: It says this pattern of
- 2 warnings is consistent with the decision that we
- 3 announced today. And I think --
- 4 JUSTICE BREYER: It wasn't -- it isn't -- it
- 5 isn't consistent with it. That's interesting.
- 6 MR. O'NEIL: Well, that argument was made by
- 7 Justice Clark in dissent and the court did not agree
- 8 with it. And I think it is clear that the court
- 9 thought --
- 10 JUSTICE BREYER: They didn't say anything
- 11 about during.
- MR. O'NEIL: Well, no, they didn't.
- JUSTICE BREYER: So -- then they don't need
- 14 to mention during at all because if that's right, the
- 15 FBI warning at that time, J. Edgar Hoover's letter or
- 16 whatever it was just talked about telling him you have a
- 17 right to counsel, doesn't say anything about during.
- 18 MR. O'NEIL: Well, I think that's exactly
- 19 the point, that you don't assume that a suspect is only
- 20 capable of understanding --
- 21 JUSTICE BREYER: So then you think that, in
- 22 fact, going by that warning that there is no
- 23 constitutional right to have them say a word about
- 24 during. This would be okay if they said nothing at all
- 25 about it.

- 1 MR. O'NEIL: I think a -- a -- advice of the
- 2 right to counsel, or as the Court put it, in a different
- 3 place in the Miranda opinion the right to paying the
- 4 services of an attorney of his choice, that would be
- 5 constitutionally adequate. The Federal government does
- 6 not use those warnings because they create a list -- a
- 7 risk of litigation.
- 8 We think that's the correct reading of
- 9 Miranda, but that, of course, is not guarantee that
- 10 other courts would read it that way. And, indeed, two
- 11 after Miranda, the Fifth Circuit had gone the other way
- 12 and decided that, in fact, a right to counsel warning is
- 13 not sufficient.
- But, Justice Breyer, I think that the answer
- 15 to how these warnings convey presence is that a suspect
- 16 is not going to draw the highly counterintuitive
- 17 assumption that if he is told that he can have an
- 18 attorney not only before answering any questions but
- 19 during this interview, that he is going to need to walk
- 20 in and out of a room each time he wants to talk to an
- 21 attorney. It may --
- 22 JUSTICE SOTOMAYOR: Just so I get to the
- 23 bottom line. If all this warning had said was, you have
- 24 a right to a lawyer before questioning --
- MR. O'NEIL: I'm sorry.

1	JUSTICE SOTOMAYOR: You have a right to a
2	lawyer before questioning
3	MR. O'NEIL: Well, we think that
4	JUSTICE SOTOMAYOR: it would be your
5	position that standing alone that would be enough?
6	MR. O'NEIL: We think that that that
7	was the warning that this Court confronted in Bridgers,
8	and we think that would be a much closer and more
9	difficult case, but we think that, yes, we we agree
10	with the decision cited in our brief that a suspect
11	would not assume that that attorney would become
12	unavailable the minute the first question is asked. We
13	think that
14	CHIEF JUSTICE ROBERTS: Thank you, counsel.
15	MR. O'NEIL: Thank you.
16	CHIEF JUSTICE ROBERTS: Ms. Brueckheimer?
17	ORAL ARGUMENT OF DEBORAH K. BRUECKHEIMER
18	ON BEHALF OF THE RESPONDENT
19	MS. BRUECKHEIMER: Mr. Chief Justice, and
20	may it please the Court:
21	Clearly Miranda could not have been more
22	specific when it said, an individual held for
23	interrogation must be clearly informed that he has the
24	right to consult with a lawyer and to have the lawyer
25	with him during interrogation.

- 1 CHIEF JUSTICE ROBERTS: So the -- so the FBI
- 2 warning that was specifically approved in Miranda was
- 3 inconsistent with Miranda?
- 4 MS. BRUECKHEIMER: I disagree with that
- 5 representation that it was approved of. What this Court
- 6 said --
- 7 CHIEF JUSTICE ROBERTS: It says it is
- 8 consistent -- consistent with the procedure which we
- 9 delineate today.
- 10 MS. BRUECKHEIMER: Consistent with is not
- 11 the same. At -- in the few pages beforehand, the Court
- 12 specifically set forth these Miranda warnings in what it
- 13 required --
- 14 JUSTICE KENNEDY: Could you tell us where
- 15 that is, I think you mean page 479, but I'm not --
- 16 MS. BRUECKHEIMER: Right. Correct, at page
- 17 479 this Court set forth the warnings that it wants to
- 18 have read to every --
- 19 JUSTICE SCALIA: It set forth the substance
- 20 of what had to be conveyed, but it set forth on page 484
- 21 its belief that the FBI warning adequately conveyed that
- 22 substance. It said this warning is consistent with our
- 23 opinion today. And -- and that warning said --
- MS. BRUECKHEIMER: Yes, I have the warning.
- 25 Yes.

1 JUSTICE SCALIA: You want to read it? 2 MS. BRUECKHEIMER: Yes, I can read it. 3 JUSTICE SCALIA: Good. 4 MS. BRUECKHEIMER: The warning said that --5 let's see -- at the -- at the outset of the interview that he is not required to make a statement, that any 6 7 statement may be used against him in court, and that the individual may obtain the services of an attorney of his 8 9 own choice. And more recently that he has the right to 10 free counsel. 11 However, the purpose --12 JUSTICE SCALIA: Well, I mean, that is so 13 much worse than --14 MS. BRUECKHEIMER: Yes, and the purpose 15 of --16 JUSTICE SCALIA: -- what you have here. 17 MS. BRUECKHEIMER: -- of saying this was 18 because the question was, is this going to be burdensome to the government, to the police to issue these 19 20 warden -- these warnings. And the very beginning of 21 that sentence, right before they said it was they --22 that the FBI is compiled --23 JUSTICE KENNEDY: What page are you on now? MS. BRUECKHEIMER: We are still on 483. 24 25 are on the sentence right above it. Over the years the

- 1 FBI has compiled an exemplary record of effective law
- 2 enforcement while advising any suspect or arrested
- 3 person at the outset of the interview that he is not
- 4 required to make a statement -- and then I just read it.
- 5 So, the -- that was to counteract whether it
- 6 was too burdensome. Not that they were --
- 7 CHIEF JUSTICE ROBERTS: Maybe, but it
- 8 says -- it says what the -- what the FBI -- the pattern
- 9 of warning -- well, let me make sure I get it exact.
- 10 "The present pattern of warnings and respect for the
- 11 rights of the individual followed as a practice by the
- 12 FBI is consistent with the procedure we delineate
- 13 today."
- 14 And the FBI warning says nothing about
- 15 presence or with -- or with counsel with him.
- 16 MS. BRUECKHEIMER: Consistent but not
- 17 identical.
- 18 CHIEF JUSTICE ROBERTS: Well, okay. I will
- 19 take "consistent with." That means that it complies
- 20 with the rule in Miranda.
- 21 MS. BRUECKHEIMER: No, I -- in all due
- 22 respect, Mr. Chief Justice, I believe that this Court
- 23 went a little further and required the presence of
- 24 counsel. And then --
- 25 CHIEF JUSTICE ROBERTS: Then how is the FBI

- 1 warning consistent with the procedure the Court
- 2 delineated in Miranda?
- MS. BRUECKHEIMER: It doesn't say that
- 4 the -- the attorney has to be present with --
- 5 CHIEF JUSTICE ROBERTS: No, I said how is
- 6 it --
- 7 MS. BRUECKHEIMER: How is it consistent?
- 8 CHIEF JUSTICE ROBERTS: Yes.
- 9 MS. BRUECKHEIMER: It -- because it -- it
- 10 gave three of the basic. You know, you have the right
- 11 to remain silent, you have the right to an attorney, the
- 12 services of an attorney; and that you have the right
- 13 to -- or any -- any statement you make may be used
- 14 against you. So they just didn't go far enough in the
- 15 FBI warning.
- 16 CHIEF JUSTICE ROBERTS: So I would say that
- 17 it's not consistent with Miranda.
- 18 MS. BRUECKHEIMER: It's -- it's consistent
- 19 to a point.
- 20 CHIEF JUSTICE ROBERTS: Okay.
- 21 MS. BRUECKHEIMER: And just as if -- and --
- 22 and they have added in more recently, the right to free
- 23 counsel.
- JUSTICE STEVENS: Well, while you are
- 25 looking at whether it would be an undue burden on law

- 1 enforcement, it was -- has a burden that is consistent
- 2 with the ones that Miranda required expressly.
- 3 MS. BRUECKHEIMER: I'm sorry?
- 4 JUSTICE STEVENS: I said when you were
- 5 inquiring that you were at the point of the opinion into
- 6 how burdensome it would be for law enforcement to give
- 7 these warnings --
- 8 MS. BRUECKHEIMER: Right.
- 9 JUSTICE STEVENS: -- you are saying the
- 10 burden would be consistent with the new warnings with
- 11 those consistent with the ones given by the FBI.
- 12 MS. BRUECKHEIMER: Right. It's not -- it is
- 13 not any more burdensome by adding in an additional
- 14 requirement.
- 15 CHIEF JUSTICE ROBERTS: What it says is that
- 16 the respect for the rights of the individual following
- 17 the FBI is consistent with.
- 18 MS. BRUECKHEIMER: Uh-huh. The rights of
- 19 the individual, right.
- 20 And the -- the Miranda Court just made sure
- 21 that they have added in the additional requirement, and
- 22 the FBI did change their warnings, and has continued to
- 23 modify and change their warnings to be consistent with
- 24 Miranda.
- JUSTICE SOTOMAYOR: The bottom line in my

- 1 mind, the question is, whether these warnings are
- 2 substantively or otherwise different than the FBI
- 3 warnings that some believe were approved in Miranda.
- 4 Are these equivalent?
- 5 MS. BRUECKHEIMER: I don't -- I believe
- 6 that -- that requiring the presence of counsel during
- 7 the interrogation goes a little bit -- a lot further.
- 8 And it -- it is not equivalent to the FBI.
- 9 JUSTICE SOTOMAYOR: I don't disagree with
- 10 you, but that wasn't my question. My question was, did
- 11 the FBI warning at issue or --
- MS. BRUECKHEIMER: At issue in Miranda?
- 13 JUSTICE SOTOMAYOR: Not at issue because it
- 14 wasn't at issue.
- MS. BRUECKHEIMER: It wasn't.
- 16 JUSTICE SOTOMAYOR: But that was reviewed
- 17 and approved in Miranda, did it give that --
- 18 MS. BRUECKHEIMER: No, it did not. And that
- 19 why -- and that's why I don't believe the Court in
- 20 Miranda ever said we -- it's consistent with -- they
- 21 never said we approve. They never said we are adopting
- that language.
- JUSTICE BREYER: Is -- is there since
- 24 then -- I mean, as I read it now I see that, as I said,
- 25 it seems very clear that they intend you to have to say

- 1 that the counsel has to be -- present with you.
- 2 Present, okay? Now the FBI warnings, which they did say
- 3 is consistent, don't say that.
- 4 MS. BRUECKHEIMER: No, they don't.
- JUSTICE BREYER: They don't.
- 6 MS. BRUECKHEIMER: They do not.
- 7 JUSTICE BREYER: Okay. Now since the time
- 8 of Miranda, has this Court ever talked about that? Has
- 9 there been any lower court or have there been -- has the
- 10 practice of the departments to any great extent been
- 11 such that they stopped talking, or did not talk, or
- 12 never spoke about a right to have a counsel with you
- 13 during -- during -- during just dropped out, they just
- 14 said forget about during. It wasn't --
- 15 MS. BRUECKHEIMER: No, the case law has
- 16 always referred to both, both by this Court and the
- 17 circuit courts. And the --
- 18 JUSTICE SCALIA: This Court in Miranda --
- 19 JUSTICE BREYER: This Court has preferred
- 20 during.
- JUSTICE SCALIA: Yes.
- MS. BRUECKHEIMER: Yes. Has -- in many
- 23 opinions talked about before interrogation and during
- 24 interrogation, the right to have counsel present.
- 25 JUSTICE SCALIA: I must say I -- this is --

- 1 this is angels dancing on the head of a pin. You want
- 2 us to believe that your client, who decided to talk,
- 3 even though he was told he could consult an attorney
- 4 before any question was asked, and he could consult an
- 5 attorney at any time during the interview, and he went
- 6 ahead and -- and confessed -- you are saying, oh, if he
- 7 had only known. Oh, if I knew that I could have an
- 8 attorney present during the interview, well, that would
- 9 have been a different kettle of fish and I would never
- 10 have confessed.
- I mean, doesn't that seem to you quite
- 12 fantastic?
- MS. BRUECKHEIMER: No, Your Honor,
- 14 especially not with a reasonable suspect that's being
- 15 questioned.
- 16 There -- they are -- we are not talking
- 17 about reasonable lawyers or reasonable justices, we are
- 18 talking about --
- 19 JUSTICE GINSBURG: How about reasonable
- 20 defendants in this very case? Powell's lawyer
- 21 questioned him and asked him: "You waived the right to
- 22 have an attorney present during your questioning by the
- 23 detectives?"
- 24 Answer: "Yes."
- This is at appendix, page 80. So apparently

- 1 counsel understood the warning to have conveyed the
- 2 right to have an attorney present during questioning by
- 3 the -- by the detectives. Counsel understood that?
- 4 MS. BRUECKHEIMER: No, counsel never --
- 5 never asked him did you knowingly waive; did you
- 6 intelligently waive? She was trying to set up the fact
- 7 that the client had waived his rights before he made a
- 8 statement in order to get to his -- his argument that
- 9 his statements were coerced.
- 10 But she was never giving up the argument
- 11 that she had made previously to that -- that testimony
- 12 that -- that the waiver was knowing and intelligent.
- 13 She just had already lost that argument in front of the
- 14 judge, and now she was addressing the jury.
- 15 JUSTICE GINSBURG: Was she asking her client
- 16 a legal question? You waived the right to have an
- 17 attorney present during the questioning by detectives,
- 18 is that what you are telling the jury?
- MS. BRUECKHEIMER: Yes. Well, he did waive
- 20 his rights, but he didn't knowingly and intelligently
- 21 waive his rights, and he did sign the form. Because
- 22 that was the next question, did you sign the form.
- JUSTICE ALITO: Do you think that the
- 24 average person hearing this warning would envision the
- 25 sort of procedure that occurs before a grand jury?

- 1 That's what it would be taken to mean?
- 2 MS. BRUECKHEIMER: I don't -- I -- I don't
- 3 think most -- most people have been in front of a grand
- 4 jury, so I don't envision that they would have that kind
- 5 of reaction.
- 6 JUSTICE GINSBURG: But do --
- 7 MS. BRUECKHEIMER: I think they would focus
- 8 on the before.
- 9 JUSTICE GINSBURG: Do you think that a
- 10 suspect would think, now, I'm in this custodial room,
- 11 they want me to stay put, are they going to have me
- 12 hopping in and out of the room to talk to my lawyer?
- 13 Wouldn't the assumption be, I'm stuck in this room, they
- 14 are holding me here, and if I have a right to talk to a
- 15 lawyer, it's got to be there and not my walking in and
- 16 out of the holding room.
- MS. BRUECKHEIMER: In right that they never
- 18 told him, that he would have the ability to talk to a
- 19 lawyer during the interrogation.
- 20 CHIEF JUSTICE ROBERTS: Is there -- is there
- 21 any -- I'm not sure this is pertinent -- but is there
- 22 any malevolent reason Tampa police would adopt this
- 23 warning? I mean, someone says well, here's what the FBI
- 24 uses. And they say, well, I tell you what, if we just
- 25 say you have a right to an attorney before answering any

- 1 questions, and then later say you can exercise this
- 2 right any time, maybe we'll be able to some people who
- 3 don't think they can actually have the lawyer there. In
- 4 other words was this just --
- 5 MS. BRUECKHEIMER: It's -- it's hard for us
- 6 to be able to delve into the minds of the Tampa police
- 7 department and the people who create these forms.
- 8 However, in the Thompson case which is before you in the
- 9 briefs, in 1984, they had it right. They said you have
- 10 the right to talk to an attorney beforehand and to the
- 11 presence of an attorney during interrogation. This was
- in a death case, and there was something wrong with the
- 13 right to free counsel. They either didn't give it to
- 14 them or not.
- 15 So why they went and changed the part to the
- 16 right to an attorney before counsel -- before the
- 17 questioning, and then during questioning, we don't know.
- 18 CHIEF JUSTICE ROBERTS: So -- and you can't
- 19 think of any bad reason they might have done it.
- MS. BRUECKHEIMER: Well, Professor Leo
- 21 could, and there is a memo he attaches at the end of his
- 22 appendix in the amici brief, but I -- I would just say
- 23 that it doesn't really matter what the motives are, and
- 24 that it all depends on how the defendant or the person
- 25 in custody is -- is perceiving these warnings and

- 1 whether he's getting the information he or she needs to
- 2 be --
- 3 JUSTICE GINSBURG: What do you do with the
- 4 -- the Court decisions in Prysock and Duckworth that
- 5 dealt with the right to appointed counsel and the
- 6 suspect was not explicitly told that he had a right to
- 7 appointed counsel at the pre-arraignment stage. That
- 8 something about -- court -- would give you --
- 9 MS. BRUECKHEIMER: Right. Well, the -- the
- 10 language in those cases had something to do with -- you
- 11 know, the idea of being that, it was almost
- 12 informational -- too much information, additional
- information as to when you were going to get your
- 14 counsel. But the four core --
- 15 JUSTICE GINSBURG: You wouldn't have to have
- 16 additional information; you just tell him, you have a
- 17 right to have a -- have counsel now, that would be fewer
- 18 words.
- 19 MS. BRUECKHEIMER: Well, they -- in Prysock
- 20 it was a matter of the order, but in Duckworth it was,
- 21 we can't get one for you at this moment kind of thing.
- 22 And no State is obligated, or agency, to provide counsel
- 23 on demand.
- 24 JUSTICE GINSBURG: Didn't one of them say
- 25 "court," and the suspect was not in court at the time?

1	MS. BRUECKHEIMER: Was not in court?
2	JUSTICE GINSBURG: Yes. That the court will
3	appoint counsel for you.
4	MS. BRUECKHEIMER: Right. And that would be
5	sometime in the future. But but they did they did
6	tell them that if you were going to be questioned you
7	have the right to counsel with you at that time. And
8	that was the important thing. Even if we had to wait,
9	they couldn't question him until he had his attorney
10	with him.
11	JUSTICE ALITO: If this warning is read the
12	way we might lawyers might read a statute or a
13	contract or something like that, then I don't know why
14	saying, "you have the right to remain silent," isn't
15	potentially misleading. It says you have the right to
16	remain silent. But once you break your silence, there
17	is nothing in there that says you have the right to
18	resume your silence.
19	MS. BRUECKHEIMER: No.
20	JUSTICE ALITO: Would you agree with that?
21	MS. BRUECKHEIMER: Except for the the
22	catch-all phrase at the bottom which is you have the
23	right to use any of these at any time.
24	JUSTICE ALITO: Do you think that is

defective, too?

25

- 1 MS. BRUECKHEIMER: Well, I think that it --
- 2 it's probably okay as far as reenforcing the right to
- 3 remain silent and informing him that any of your answers
- 4 can be used against you, but I don't think it salvages a
- 5 right that's not there, which is the right to presence
- 6 during interrogation.
- 7 JUSTICE ALITO: So once you break your --
- 8 you have the right to remain silent, but once you break
- 9 that right, the fact that you have that right to use
- 10 that right to remain silent in the future doesn't mean
- 11 you can stop answering questions.
- MS. BRUECKHEIMER: Well, the -- the
- 13 catch-all phrase might inform them that they could stop,
- 14 but clearly, if they had the right to presence of
- 15 counsel with them, that might --
- 16 JUSTICE KENNEDY: We could write that down.
- 17 It could be the next case.
- 18 MS. BRUECKHEIMER: Right. And I do -- I
- 19 also contest the language that the opposing counsel uses
- 20 that says that we have somehow locked in everybody with
- 21 -- with what the -- what the decision below said.
- The decision below held that, and I quote at
- 23 541, "We hold that Powell should have been clearly
- 24 informed of his right to the presence of counsel during
- 25 the custodial interrogation." It's not magic language.

- 1 It's not so -- so written in stone that it's not
- 2 explicit language.
- 3 There is -- this language follows what this
- 4 Court has said. The reasonable language, the clearly
- 5 informed language. It isn't locking everyone into these
- 6 exact words down the line. And there are hundreds of
- 7 ways that this could be said. So -- and then the Court
- 8 noted that the catch-all phrase did not effectively
- 9 convey to Mr. Powell his rights to presence before and
- 10 during and that the last sentence could not effectively
- 11 convey a right that he was never told he had.
- 12 As far as whether or not this case should
- 13 even be here, even though the Florida Constitution and
- 14 the Florida Court has gone along the same road, traveled
- 15 a parallel road with this Court, and it hasn't seen a
- 16 need to deviate. They -- they may see a need to deviate
- 17 here, should this Court disagree.
- 18 JUSTICE GINSBURG: Well, they are -- they
- 19 are free to do that. I mean, politically, they might
- 20 consider it risky, but if we say that the charge was
- 21 good enough, the Florida Court could say, but it's not
- 22 good enough under our Constitution.
- MS. BRUECKHEIMER: Correct. And -- and I
- 24 believe they would.
- JUSTICE KENNEDY: Well, I'm -- I'm not sure

- 1 that's the case. The remand in Long was only to address
- 2 another issue. The Long Court took its determination as
- 3 being binding on the issue that was before the Court in
- 4 Long in that case.
- 5 MS. BRUECKHEIMER: Well, the Florida Supreme
- 6 Court must have referred to its constitutional provision
- 7 Article I Section 9 at least five times.
- 8 JUSTICE KENNEDY: And in each time it said
- 9 it was by extension from Miranda. It always linked it,
- 10 and that was the question that was presented in the
- 11 State Court that it certified.
- MS. BRUECKHEIMER: Right. And the -- it's
- 13 almost like Miranda is being used as a generic concept
- 14 for warnings. You know, where complying with Miranda --
- 15 JUSTICE KENNEDY: That's the whole reason we
- 16 have jurisdictions, so that Miranda will not be confused
- 17 and so it won't be a hazard on the landscape when people
- 18 say "Miranda" and they mean something else.
- 19 MS. BRUECKHEIMER: Right, but -- you know --
- 20 JUSTICE KENNEDY: And it's not at all clear
- 21 that the Washington -- that the Florida Supreme Court
- 22 could in this case go back to the Constitution. That's
- 23 -- you can't get fat out of a log.
- 24 MS. BRUECKHEIMER: You can't go lower than
- 25 the Federal Constitution, but they can give more rights.

- 1 JUSTICE KENNEDY: It's -- maybe in some
- 2 other case. Not necessarily in this one, because Long
- 3 leads to -- to the contrary.
- 4 MS. BRUECKHEIMER: Well, in Traylor, which
- 5 is the Court that -- the case that the Florida Supreme
- 6 Court and the decision below relied heavily upon, they
- 7 said that we are the ceiling and the Court is the
- 8 bottom, and --
- JUSTICE KENNEDY: But you have no case in
- 10 which the Florida Supreme Court has explicitly said that
- 11 we have a warning that is more strict, more rigorous
- 12 than what Miranda requires. You have no case.
- MS. BRUECKHEIMER: No, and they -- they
- 14 didn't feel like they had to -- to deviate, because they
- 15 felt like their definition of presence of counsel, which
- 16 was the right to consult with an attorney before and the
- 17 right to have counsel present during the interrogation,
- 18 was consistent with the holdings in Miranda. So they
- 19 didn't feel the need to deviate.
- 20 But they did say that that is our definition
- 21 as we set forth in -- in Traylor, and that --
- 22 JUSTICE SCALIA: I'm curious. When this
- 23 goes back to them, do you think they can deviate? They
- 24 were answering a certified question, which was simply
- 25 whether this -- this warning complied with Miranda.

- 1 That was the only certified question.
- 2 So when it goes back, I assume they, having
- 3 said no, will now have to say yes. Can they go on and
- 4 say: Oh, and by the way, even though it doesn't violate
- 5 Miranda, we think it violates the State Constitution?
- 6 MS. BRUECKHEIMER: I believe they can,
- 7 because as long as they are not going below what this
- 8 Court mandates, they provide more protections.
- 9 JUSTICE SCALIA: But that wasn't the
- 10 question asked of them. The only question asked of them
- 11 was whether it complied with Miranda.
- MS. BRUECKHEIMER: Right. And they --
- JUSTICE STEVENS: That's really not --
- 14 that's really not quite accurate. Because they used the
- 15 term "Miranda warnings" generically, as opposed to a
- 16 category of warnings which are required by both the
- 17 Federal Constitution and the State Constitution, and
- 18 they said it violated the State Constitution.
- 19 MS. BRUECKHEIMER: Yes, they did. And they
- 20 did -- they did say we have our standard under Traylor,
- 21 that we defined the right to the presence of counsel or
- 22 to the help of counsel as requiring presence during, as
- 23 --
- JUSTICE KENNEDY: Well, except the words
- 25 that it quoted from the lower court opinion -- that is,

- 1 we are talking about the -- the Fifth Amendment, and by
- 2 extension, Article I, Section 9. So that seems to me to
- 3 indicate that it is incorporating it, not going further.
- 4 MS. BRUECKHEIMER: Well, if -- if --
- 5 JUSTICE STEVENS: That's not in the question
- 6 they -- they took.
- 7 MS. BRUECKHEIMER: No. No, that's not in
- 8 the question.
- 9 But there is a way to -- you know, they
- 10 repeated all along the way, Article I, Section 9. They
- 11 kept repeating it. They didn't have to. If they were
- 12 just going to say: Oh, by the way, our Constitution
- 13 goes along with this, they could have said it in
- 14 passing. They could have also said that, We -- we
- 15 choose not to interpret --
- 16 JUSTICE KENNEDY: I think the opposite. I
- 17 think the repeated linkage shows that they think they
- 18 are the same.
- 19 MS. BRUECKHEIMER: Well, then, again, I
- 20 would say that they -- they agree that we are traveling
- 21 along the same road, but they have -- they are stressing
- 22 the fact that they have set a line in the sand as far as
- 23 what they're interpreting the right to presence --
- JUSTICE SCALIA: Well, the question asked:
- 25 Does the failure to provide express advice of the right

- 1 to the presence of counsel during questioning vitiate
- 2 Miranda warnings?
- 3 Okay? That's the question. They have a
- 4 footnote after Miranda which reads, Miranda v. Arizona,
- 5 384 U.S. 436. I take that to mean that the question is
- 6 whether this warning violates Miranda.
- 7 MS. BRUECKHEIMER: And, of course, if they
- 8 did violate the baseline, the minimum standard set forth
- 9 in Miranda --
- 10 JUSTICE SCALIA: Right.
- 11 MS. BRUECKHEIMER: -- then it would be
- 12 unconstitutional.
- 13 JUSTICE SCALIA: Absolutely.
- MS. BRUECKHEIMER: So -- which is why
- 15 Traylor and the Florida Constitution kept making --
- 16 because they didn't have to really get to what the
- 17 bottom or the baseline or the minimum standard was, as
- 18 long as Florida had set forth a standard.
- 19 JUSTICE SCALIA: Well, that's true, but --
- 20 but if they -- if they felt the authority to go beyond
- 21 Miranda, wouldn't they have had to say no to this
- 22 question, if we find that way? And then go on to say:
- 23 But it does violate our own? And that's beyond the
- 24 question that they -- that was certified to them.
- 25 MS. BRUECKHEIMER: And I believe the idea

- 1 that they didn't think it was deviating from the Miranda
- 2 case. But if this Court finds that it does, then they
- 3 -- they will probably -- and I feel confident that they
- 4 would fall back on the Constitution -- of the Florida
- 5 Constitution.
- 6 JUSTICE GINSBURG: But they did say over and
- 7 over again -- one was the certified question and another
- 8 was the issue before the Court -- is whether the failure
- 9 to provide express advice of the right to the presence
- 10 of counsel during custodial interrogation violates the
- 11 principles espoused in Miranda with the citation.
- I mean, they said many, many times that the
- 13 question was -- what did Miranda mean was the issue, not
- 14 what -- what did Florida's extension of Miranda.
- 15 MS. BRUECKHEIMER: Well, they do have a
- 16 section in looking at, you know, other circuit courts in
- 17 the Federal system, and all -- what our Florida courts
- 18 are doing, and -- which is when they get into the
- 19 concept of -- well, they start out talking about Traylor
- 20 and our Constitution at the beginning, and they -- they
- 21 repeat it at the end because they believe it is
- 22 consistent with. They believe it is following along.
- 23 But they never say that -- that our
- 24 Constitution isn't insignificant or that it's not
- 25 important. If they did, they wouldn't have felt the

- 1 need to cite Traylor.
- 2 JUSTICE GINSBURG: I think you would have
- 3 had a much weightier argument if it hadn't been for
- 4 Michigan v. Long. If you could have said --
- 5 MS. BRUECKHEIMER: It would have been nice.
- 6 JUSTICE GINSBURG: We could have then
- 7 remanded to ask the Florida Supreme Court: Was it
- 8 independently ruling under its Constitution?
- 9 MS. BRUECKHEIMER: I -- I will keep that in
- 10 mind.
- 11 (Laughter.)
- MS. BRUECKHEIMER: The -- the idea of clear
- 13 reasonably -- clear -- whichever the standard is,
- 14 Justice Sotomayor, I believe the Florida Supreme Court
- 15 used the correct standard and used the one by saying
- 16 that it was clear -- you know, whether or not Mr. Powell
- 17 was clearly informed.
- 18 So no matter which standard you use, as far
- 19 as functionally equivalent or whatever, I believe that
- 20 this falls within the four corners of that.
- 21 The obligation -- let's see, I'm looking to
- 22 see what other cases -- general cases.
- 23 They -- the -- the opposition cites to the
- 24 fact that there is this great conflict going on amongst
- 25 circuits. I don't believe that such a conflict is --

- 1 whatever those cases were deciding, I don't believe they
- 2 would have approved of this language.
- This language, because of the "before"
- 4 limiting language and excluding the "presence during"
- 5 language, became misleading. And the -- the general
- 6 cases that like -- just the plain language, you have the
- 7 right to the presence of counsel, they -- they are not
- 8 inconsistent with -- with what Florida has required.
- 9 They -- they would not disagree that there --
- 10 JUSTICE ALITO: Well, you said that the
- 11 average person wouldn't take this warning to mean --
- 12 to -- wouldn't envision a procedure like the grand jury
- 13 procedure. What does it mislead the average person to
- 14 think?
- 15 MS. BRUECKHEIMER: That he -- that once
- 16 questioning starts, that he -- he has no right to
- 17 consult with a lawyer anymore, and it certainly
- 18 doesn't -- and tell him that he has the right to the
- 19 presence of an attorney with him in an interrogation
- 20 room, where the coercion takes on a highly new meaning.
- 21 I mean the coercive practices that are --
- 22 that are --
- JUSTICE ALITO: But the latter part of that
- 24 is the grand jury question. You have a right to consult
- an attorney, but you don't have the right to have an

- 1 attorney present.
- 2 MS. BRUECKHEIMER: I don't -- I don't
- 3 believe -- any -- any of the normal reasonable suspects
- 4 are -- would probably be even aware of what the grand
- 5 jury proceeding was about.
- 6 JUSTICE ALITO: Okay. So then your argument
- 7 is that this -- that what -- what a normal -- an average
- 8 person would take this to mean is that you -- you can
- 9 talk an -- to an attorney before starting to answer
- 10 questions, but not once the questioning begins. That's
- 11 what you take it to mean?
- MS. BRUECKHEIMER: Correct, and I'm not the
- 13 only one. There were five Supreme Court justices, a
- 14 majority on the second -- the majority of the second
- 15 district judges in Powell and seven judges on the second
- 16 district level, who all found that to be the case, and
- 17 we are talking someone who doesn't have that level of
- 18 intelligence.
- 19 And he may have had a prior record -- he did
- 20 have a prior record, but that doesn't mean --
- 21 JUSTICE ALITO: Well, all of those people
- 22 are lawyers, and lawyers are known to read legal
- 23 documents very precisely. The average person may read
- 24 them very differently.
- MS. BRUECKHEIMER: Correct, and in this

- 1 case --
- 2 JUSTICE SCALIA: Sometimes, a little
- 3 knowledge is a dangerous thing.
- 4 (Laughter.)
- 5 MS. BRUECKHEIMER: Yes.
- 6 And I do believe that, if this Court were to
- 7 reverse, that would set a new floor for these forms and
- 8 that there would be the danger of the fact that -- I
- 9 mean, if -- if the Tampa public -- police department is
- 10 always changing its forms -- which they have shown to be
- 11 the case, they have changed these forms in the past, why
- 12 wouldn't other agencies decide to change their forms and
- 13 make these --
- 14 CHIEF JUSTICE ROBERTS: You -- you think
- 15 it's a good thing, though, that they change their forms
- 16 to track the FBI form after -- after this litigation
- 17 started.
- 18 MS. BRUECKHEIMER: I -- yes. I do believe
- 19 that, when they changed the form to comply with the
- 20 decision below and with what's going on in 97% -- or 96%
- 21 of the jurisdictions, it doesn't have to be exact
- 22 language, it just has to be there, then -- then the --
- 23 then the system runs beautifully.
- I can't tell you the last time I had a
- 25 Miranda warning case, and I have been doing this for

1	almost	30	vears
_	ariiosc	20	y Carb.

- There is no litigation when it's done
- 3 correctly, and it's mostly done correctly.
- 4 Thank you.
- 5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 6 Counsel, you have a minute remaining.
- 7 REBUTTAL ARGUMENT OF JOSEPH W. JACQUOT
- 8 ON BEHALF OF THE PETITIONER
- 9 MR. JACQUOT: Mr. Chief Justice, let me make
- 10 three brief points, after responding to a question that
- 11 Justice Stevens asked.
- 12 In terms of independent and adequate State
- 13 grounds, in our brief, we relied on the Florida court
- 14 citing Miranda, the case, not Miranda, as the
- 15 phraseology, that the Florida Supreme Court interwove
- 16 the federal law based on Miranda, the case itself, and
- 17 there is no plain statement to the otherwise.
- Three quick points: There is no
- 19 manipulation behind this warning. This warning is the
- 20 result of litigation in Thompson v. State. That was a
- 21 1991 decision by the Florida Supreme Court.
- The -- the Tampa police had changed its
- 23 warning. The previous warning had 148 words. This
- 24 warning is simpler, with 79 words. The previous warning
- 25 had arcane and redundant language. This language is

1	more straightforward.
2	Those are the reasons behind the change in
3	the warning, not any kind of inference, as amici makes
4	towards manipulation.
5	Second, what Respondent is asking for is
6	exactly what this Court chose not to do in Prysock.
7	It told the
8	CHIEF JUSTICE ROBERTS: Thank you, counsel
9	The case is submitted.
10	(Whereupon, at 12:15 p.m., the case in the
11	above-entitled matter was submitted.)
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